

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**KJV, LLC and LAF, LLC,
Plaintiff,**

NO. 4:10-cv-01765

v.

**TOTAL BAKING SOLUTIONS, LLC,
Defendant.**

§
§
§
§
§
§
§

**DEFENDANT’S VERIFIED MOTION FOR RULE 70 RELIEF IN ENFORCEMENT OF
A JUDGMENT AND MOTION FOR CONTEMPT**

COMES NOW, Total Baking Solutions, LLC’s (“TBS”) and files this its verified Motion for Rule 70 Relief in Enforcement of a Judgment and Motion for Contempt. TBS respectfully requests that this Court issue such writs of assistance and/or other relief as necessary to compel Plaintiffs to conform to this Court’s order to dissolve Plaintiffs’ Writ of Attachment..

A. FACTS

1. On May 16, 2010, KJV, LLC & LAF, LLC (“Plaintiffs”) filed this lawsuit against Total Baking Solutions, LLC and requested a Writ of Attachment for a container of baking equipment located in the Port of Houston. Plaintiffs alleged that such equipment was owned by Total Baking Solutions. A Writ of Attachment was issued and, since May 19, 2010, the subject container has been in the possession of RBex Inc. d/b/a Apple Towing Co. (“Apple Towing”), while Total Baking Solutions and its customer who purchased the equipment have been denied access.

2. On July 26, 2010, this Court issued its order dissolving the Writ of Attachment. (Doc. #16). This Court further issued a Final Judgment that the underlying case be dismissed for lack of personal jurisdiction. (Doc. #17). All costs were assessed against the Plaintiff.

3. TBS immediately contacted the United States Marshal's office for information regarding the release of the property. Deputy Marshal Patrick Schmidt notified Apple Towing of the order and notified Plaintiff of its responsibility to pay all costs. Counsel for TBS has been in communication with Apple Towing and was provided a bill of costs showing that \$4,185 was due as of July 30, 2010 and that \$35/day continues to accrue for each day the container is held by Apple Towing. A true and correct copy of that Bill of Costs is attached as Exhibit "A" and incorporated herein by reference. Apple Towing will not release the container without payment of the outstanding amount. On July 30, 2010, the undersigned spoke with counsel for Plaintiffs who assured her that payment by wire transfer would be made by Monday, August 2, 2010. Counsel for Plaintiffs made similar assurances to Apple Towing and Deputy Marshal Schmidt.

4. On Tuesday, August 3, 2010, the undersigned counsel spoke again with Deputy Marshal Schmidt and Apple Towing on a conference call regarding Plaintiff's failure to pay and the lack of responsiveness of Plaintiff's counsel. The undersigned attempted to call Plaintiff's counsel and left a message. No return call has been received.

5. As of the filing of this motion the amounts due to Apple Towing have not been paid by Plaintiffs and neither TBS nor its customer has access the equipment.

B. ARGUMENT AND AUTHORITY

6. Under Rule 70, the Court is vested with equitable powers to enforce its judgments. FED. R. CIV. P. 70. Specifically, where possession of property has been awarded, a writ of assistance is proper. FED. R. CIV. P. 70(d). Further, such writs of assistance may be awarded against a non-party. FED. R. CIV. P. 71.

7. TBS has been denied access for more than two months to baking equipment owned by and

designed for its customer in the Dominican Republic. The situation has caused TBS loss of money, goodwill with its customer and the expenditure of attorney's fees and costs. Despite this Court's order dissolving the writ of attachment, which should now allow TBS and its customer access to the equipment, they still cannot gain access. Each day that access to this equipment is denied causes additional delay and damages to TBS and its customer.

8. Therefore, TBS requests a Writ of Assistance compelling Plaintiffs to pay all amounts owing for the release of the container and/or compelling Apple Towing to release this container. TBS further asks for any such relief provided for under the statutes and rules and to which the Court finds it is justly entitled.

C. REQUEST FOR EMERGENCY SUBMISSION

9. Because damages caused and related to the release of this equipment continue to grow on a daily basis and because this Court has previously issued an order and judgment which have gone unheeded, Defendant asks that this Motion be Submitted to the Court for consideration immediately upon filing.

Respectfully submitted,

DRUCKER, RUTLEDGE & SMITH, L.L.P.

By: /s / Rachael M. Rolon

Rachael M. Rolon, Attorney in Charge

SBN: 24013418

Fed ID: 560838

Waterway Plaza One

10003 Woodloch Forest Drive, Suite 225

The Woodlands, Texas 77380

Telephone: 281-681-3515

Facsimile: 281-681-3543

rolon@drs-llp.com

**OF COUNSEL:
DRUCKER, RUTLEDGE & SMITH, L.L.P.**

Rachel LeMay Of Counsel
SBN: 24053322
Fed ID: 934975
Waterway Plaza One
10003 Woodloch Forest Drive, Suite 225
The Woodlands, Texas 77380
Telephone: 281-681-3515
Facsimile: 281-681-3543
lemay@drs-llp.com

CERTIFICATE OF CONFERENCE

I attempted to contact counsel for Plaintiffs, Mr. Moll, on Tuesday, August 3 at both his office and cell phone and left a voicemail message on his cellular phone. No response has been received. In addition, I was told by Deputy Marshall Schmidt and a representative of Apple Towing that, other than an initial promise to pay by wire transfer on Monday, August 2, they have been unable to receive any commitment to pay the owed amounts. Therefore, it is presumed that Plaintiffs are opposed to this motion.

By: /s/ Rachael M. Rolon
Rachael M. Rolon

CERTIFICATE OF SERVICE

I certify that pursuant to the Federal Rules of Civil Procedure, a true and correct copy of this document with attachments was forwarded (via U. S. mail 1st Class ____; CMRRR ____; hand delivery ____; CM/EDF electronic notification ☒) to the following on August 6, 2010:

Attorneys for KJV, LLC and LAF, LLC

Robert G. Moll SBN: 00784622 Fed ID: 15213

Hill Rivkins LLP

55 Waugh Drive, Suite 1200

Houston, Texas 77007

Tel: 713-222-1515

Direct: 713-457-2288

fax: 713-222-1359

rmoll@hillrivkins.com

www.hillrivkins.com

By: /s/ Rachael M. Rolon

Rachael M. Rolon

VERIFICATION

STATE OF TEXAS

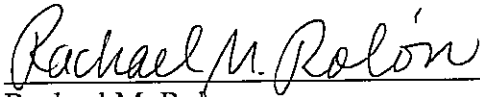
§

§

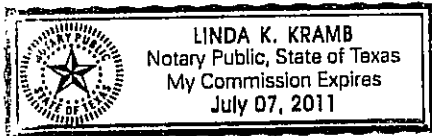
COUNTY OF MONTGOMERY

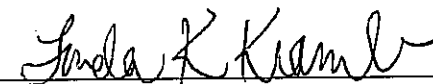
§

BEFORE ME, the undersigned authority, on this day personally appeared Rachael M. Rolon, a person whose identity is known by me. After I administered an oath to her, upon oath she said that she has reviewed the foregoing document, Defendant's Verified Motion for Rule 70 Relief in Enforcement of a Judgment and Motion for Contempt and that the information contained therein is true and correct based on her personal knowledge.


Rachael M. Rolon

SUBSCRIBED AND SWORN TO before me this 6th day of August, 2010.




Notary Public, State of Texas